

## DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

INDIANAPOLIS

### **OFFICE MEMORANDUM**

Date: November 2, 2001

To: Water Pollution Control Board

From: Tim Method,  
Deputy Commissioner

Nancy King  
Office of Legal Council

Subject: Recall and Readoption of LSA Document # 00-235(F)

At the November 14, 2001, Water Pollution Control Board meeting, IDEM will ask the Water Pollution Control Board to “readopt” the Confined Feeding rule.

IDEM will recommend changes prompted by discussions with the Attorney General’s Office subsequent to the July re-final adoption. IDEM believes the changes will enhance the defensibility of the rule and that they do not substantively alter the requirements of the rule for almost all potentially affected persons nor do they lessen its protection of water quality.

The key changes:

- ? Eliminate the provisions relating to “other animal feeding operation” and therefore limit specific provisions of the rule to those species specifically identified in the statute.
- ? Clarify the procedures for subsequent submittal of the statutorily mandated manure management plan and approval renewals.
- ? Change the term “modify” to “amend” and change “terminate” to “revoke” to mirror statutory language.
- ? Change the applicability dates from January 1, 2002, to April 1, 2002, to reflect the expected three-month delay in the effective date of the rule from the time that the rule was re-final adopted in July.

Further information is provided below:

### **Background**

The Attorney General’s office has asked the agency to recall the Confined Feeding Operation (CFO) rule, final adopted by this board in March and readopted in July of this year . A formal notice of recall

was submitted to the Attorney General (AG) and the Legislative Services Agency (LSA) for publication in the November *Indiana Register*.

Under IC 4-22-2-40, a rule may be recalled at any time before the rule is accepted for filing by the Secretary of State. Under this same statute, a board may reconsider its adoption action and adopt either an identical rule or a revised rule. IC 4-22-2-40(c). After readoption, the rule will be resubmitted to the AG for review, submitted to the Governor for signature and then the Secretary of State for filing. It will be effective thirty (30) days after filing.

### **Reasons for Recall**

The AG has asked that the CFO rule be recalled primarily to clarify an authority issue within the rule. The primary concern was that the inclusion of “other animal feeding operations” as a regulated entity did not closely mirror the statutory definition of “confined feeding operation” in that the definition provides that an “animal feeding operation” becomes a confined feeding operation either voluntarily or after there has been a violation of water pollution control laws or regulations. Therefore, reference to “other animal feeding operations” has been removed, as well as the definition of “other animal feeding operations”.

Also, the existing language in 327 IAC 16-1-2 subsection (b) was considered to be potentially confusing to existing operations that have already been required to submit a manure management plan. Because the renewal of an approval is linked to the submission of a manure management plan every five years, existing operations will have to submit a renewal application less than five years after the effective date of this rule, depending on when they submitted their manure management plans. (A noncode provision from the 1997 legislative session, P.L. 125-1997, Section 60, required that existing operations submit a manure management plan before July 1, 2000).

The AG also pointed out areas where a reference to another part of the rules would clarify the regulations. In Rule 8, the design and construction standards, a specific cross reference was added in 327 IAC 16-8-3 to section 1 regarding the type of information the commissioner would use in determining the distance above bedrock that a new waste management system must be in karst terrain. There were a number of smaller, “clarifying” issues that the AG suggested IDEM clean up as well. For example, wherever the rule discusses “modifications” of an approval, the term has been changed to “amendments” because “amend” is the exact statutory language from IC 13-18-10. Similarly, the term “terminate” was replaced with “revoke” to mirror statutory language. There is no substantive effect to these changes; they are merely word choices that more exactly replicate the statutes. A specific list of each suggested change is included in your board packet, along with a copy of the rule with the suggested amendments incorporated.

Because the AG has already undertaken a full forty-five day review of the rule and has worked closely with IDEM on the revisions, the AG’s office has assured IDEM that the review subsequent to the readoption will be as expeditious as possible. It is anticipated that the rule will be effective, if readopted on November 14, shortly after the first of the year.

### **Board Action**

Under IC 4-22-2-40, the board may readopt a rule after an agency recalls it. This rule has been recalled once and the board held a second final adoption hearing on it in July of this year. That recall was necessary to fix a procedural defect in the rulemaking process. Thus, another final adoption hearing was necessary. This recall is to clarify a number of points in the rule that do not affect the actual operation of the rule, rather, they clarify the agency's authority and the specific requirements that must be met. A number of minor wording changes were made to more exactly replicate the statutory language of IC 13-18-10. The board is not required to hold a hearing before readoption of this rule under IC 4-22-2-40. Therefore, at the November 14, 2001 meeting, IDEM will present the rule to the board, discuss the suggested changes and ask the board to adopt those changes. Then the board will be asked to readopt the rule as amended.